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Case No. 87-1376

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF OHIO, EX REL. CITY OF EUCLID,
Relator-Appellant,

v.

RICHARD L. SHANK, DIRECTOR OF THE OHIO ENVIRONMENTAL PROTECTION AGENCY
Respondent-Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

ANTHONY J. CELEBREZZE, JR.
Attorney General

MARGARET A. MALONE*
Assistant Attorney General

Environmental Enforcement Section
30 East Broad Street, 17th Fl.
Columbus, Ohio 43266-0410
(614) 466-2766

Attorney for Appellee

***Counsel of Record**

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether an appeal is authorized under 28 U.S.C. §1257(2) where the appellant has failed to raise in the court below a challenge to any state statute as repugnant to federal law and the decision of the court below has not decided the validity of any state statute.

2. Whether, given the presence of adequate and independent grounds under Ohio law supporting the Ohio Supreme Court's decision to reject Euclid's demand that it issue two high prerogative writs, and the absence of any substantial federal question which would mandate that the Supreme Court exercise its plenary discretion as demanded by the City, this court should decline to exercise its discretionary jurisdiction in this case.

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Appellee, Richard L. Shank moves the Court to Dismiss the appeal herein or, in the alternative, to affirm the judgment of the Ohio Supreme Court on the grounds that: the appeal is not within this Court's jurisdiction; does not present a substantial federal question that was properly raised and expressly passed on; the judgment rests on an adequate non-federal basis; and it is manifest that the questions upon which the decision depends are so unsubstantial as not to need further argument.

COUNTER-STATEMENT OF THE CASE

Because Appellant City of Euclid, Ohio (hereinafter "Euclid" or the "City") woefully mistated the facts which gave rise to this appeal in its jurisdictional statement, Appellee Richard L. Shank, Ph. D., Director of Environmental Protection, State of Ohio (hereinafter the "Director"), submits the following Counter-Statement of the Case. The factual allegations made in this section are taken from the sworn Affidavit of John Sadzewicz, Manager of the Public Wastewater Section, Division of Wastewater Pollution Control, Ohio Environmental Protection Agency (hereinafter" "Ohio EPA"), which was attached as Exhibit A to the Motion to Dismiss submitted by the Director in the Ohio Supreme Court below.[1]

I. HISTORICAL OVERVIEW OF EUCLID'S WATER POLLUTION PROBLEMS

The ruling Euclid purports to appeal from in this case is the refusal of the Ohio Supreme Court to interfere with an action filed by the United States and the State of Ohio in the United States District Court for the Northern District of Ohio, Eastern Division, to bring Euclid into compliance with the substantive provisions of the federal Clean Water Act, 33 U.S.C. 1251, et seq.,[2] and analogous provisions of Ohio law. Accordingly, in order to understand the ruling of the Court below it is necessary to understand the facts which gave rise to the federal enforcement action.

The wastewater treatment plant ("WWTP") currently serving the City was originally constructed sometime in the 1920's. Although the City attempted to upgrade its WWTP several times since then, by the mid-1960's the state of the art and the City's needs had reached the point where

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[1] A copy of Mr. Sadzewicz' Affidavit is attached as Appendix 2.

[2] The case is still pending (United States v. City of Euclid, et al., Case No. C83-3855).

additional upgrading was necessary to meet regulatory requirements.

Since 1966 the City has submitted, or agreed to, no less than seven construction schedules for the completion of improvements at its WWTP, all of which the City has failed to meet. The first, submitted by the City to the Ohio Department of Health ("ODH") on June 14, 1966,[3] proposed to complete the construction of improvements on or before September 30, 1969. The plan for those improvements was abandoned by the City on November 16, 1969, after the general engineering plan completed by the City's consultant (five months late) indicated that to construct the proposed improvements, the City would have to expand its WWTP into a city park and nearby residential area. (When made public the general plan resulted in a storm of public protest.)

The second construction schedule, submitted by the City to ODH on December 2, 1969, proposed to complete construction of needed WWTP improvements on or before December 31, 1972 (in accepting this proposal, the State moved the completion date back to December 1, 1972). However, by October 5, 1971, the City's consultant had only just finished the detailed design for the improvements. On December 6, 1971, Euclid's City Council approved this detailed design, together with a new construction schedule (the third by that date) which called for construction to be completed on or before May 25, 1974.

May 25, 1974, came and went without the initiation, much less the completion, of construction on improvements to Euclid's WWTP. In fact, construction did not commence until sometime in 1975, and only after the City had been given approximately $11 million in federal funds and loaned approximately $6 million in State funds (at an interest rate

[3] In 1966 ODH was responsible for overseeing the State's water pollution control program. The Ohio Environmental Protection Agency assumed ODH's responsibilities in that field when it was created by the Ohio legislature in 1972.

substantially below the market) to support its construction efforts.

The fourth in the (by then) growing collection of construction schedules for improvements to Euclid's WWTP was issued on October 1, 1974, as part of the first NPDES[4] Permit given the City by OEPA for its WWTP. This permit called for: completion of construction 21 months after its proposed effective date (August 1, 1976); achievement of operational levels (compliance with final effluent limitations) 25 months after its proposed effective date (December 1, 1976); compliance with interim effluent limitations during construction; and compliance with final effluent limitations (of 12 milligrams per liter on the thirty day average concentration of suspended solids ["SS"] and organic contaminants having a five day biochemical oxygen demand ["BOD_5"] in the wastewater discharged from Euclid's WWTP into Lake Erie[5] after construction.

At the time when Euclid's first NPDES Permit expired in June of 1977, the Clean Water Act required municipal compliance with final effluent limitations in NPDES permits

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[4] National Pollutant Discharge Elimination System, established by Congress in 1972 to regulate discharges of pollutants into the navigable waters of the United States. See, 33 U.S.C. § 1342(a). Ohio EPA administers this permitting system in Ohio pursuant to authority delegated to it by U.S. EPA under 33 U.S.C. 1342(b).

[5] Hereinafter referred to as the "12/12 limits".

by July 1, 1977.[6] Although by this time Euclid had at long last begun construction of required improvements to its WWTP, in June of 1977 it was clear that Euclid would not complete those improvements by July of that same year.

Therefore, in order to protect Euclid, while at the same time fulfilling its obligations under the Clean Water Act, on June 8, 1977, OEPA issued Euclid its second NPDES Permit, (which became effective on September 8, 1977), with only one set of immediately effective effluent limitations, the 12/12 limits from the table of final effluent limitations in its first NPDES Permit. On that same day, then Ohio EPA Director Ned Williams wrote Euclid an Enforcement Compliance Schedule Letter ("ECSL"). This ECSL essentially provided that Ohio EPA would exercise prosecutional discretion and not file suit against Euclid to enforce the final effluent limitations of the City's 1977 NPDES Permit, if Euclid would commit both to finish construction of improvements to its WWTP and attain compliance with the final limitations of its NPDES Permit on or before July 22, 1978, and to meet specified, more lenient effluent limitations during the construction period. The City promptly accepted this offer, and, almost as promptly (in January of 1978), violated its commitments under its agreement with Ohio EPA by violating one or more of the interim effluent limitations it had agreed to meet while construction was ongoing.

Further, notwithstanding Euclid's committment to do so, construction of improvements to Euclid's WWTP was not completed by July 22, 1978. Indeed, according to Euclid's

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[6] As originally enacted in 1972, Section 301(b) of the Clean Water Act, 33 U.S.C. 1311(b), required final municipal compliance on or before July 1, 1977. Although Congress later amended Section 301 to extend this municipal compliance deadline, first until July 1, 1983, and later until July 1, 1988, it did not appear to Ohio EPA that Euclid qualified for this extension because Congress intended the principle beneficiaries of its amendment(s) extending the compliance deadline to be cities who, through no fault of their own, could not comply by July 1, 1977, either because some peculiarly local problem rendered such compliance physically impossible or because the municipality had not received federal funding assistance. Euclid did not qualify in either regard.

representations to the U.S. District Court, construction of these improvements to Euclid's WWTP was not entirely completed until sometime in 1980. Moreover, by the Spring of 1979, portions of those improvements which had been installed had already begun to fall into disrepair because of a number of factors, including: lack of routine maintenance; improper operation; inadequate funding of spare part inventories and capital improvements; and the fact that Euclid's WWTP regularly was called upon to treat more water than it should have because rainwater was permitted to infiltrate into Euclid's sewer system, where it was carried to the WWTP, thereby adding unnecessarily to the waste the plant was required to treat. Also relevant in this regard is the fact that Euclid employed a Class I operator to operate its WWTP when the WWTP was large enough to require a Class IV operator.[7]

After an inspection of Euclid's WWTP on January 30, 1979, revealed that the condition of the WWTP was marginal, with much of the plant's equipment broken down, Ohio EPA on May 14, 1979, issued Euclid Findings and Orders. These Orders required the City, *inter alia,* to fix the equipment which the inspection in the preceding January had found to be inoperable by date(s) certain, and gave Euclid a relaxed effluent limitation table to meet during the period that the repairs were to be performed (until September 19, 1979). Euclid failed to comply with these Findings and Orders, either

[7] Ohio EPA has established an WWTP operator classification system which classifies WWTP's by size (Classes I through IV), licenses WWTP operators accordingly, and requires that a WWTP be operated by an operator who is licensed by the State to operate that size treatment plant or larger.

by failing to meet the deadlines for compliance, or by failing to accomplish the required repairs altogether.[8]

Conditions were so bad at Euclid's WWTP that in 1982 Euclid asked its consultant to develop yet another plan to get its sewage treatment plant operating again. That plan, completed in November of 1982, called for repairs, which were to be funded through another low interest loan from the State, with a completion date sometime in December of 1984. According to the status reports filed by the City with Ohio and U.S. EPA, with the exception of the third stage filters, all of the repairs proposed in 1982 for the WWTP were not completed until sometime in 1987.

If this were merely a case of "no harm, no foul", neither the federal government nor the State of Ohio would have filed suit against Euclid in 1983 to enforce the terms of Euclid's 1977 NPDES Permit. As the lengthy history set forth above makes plain, although the gist of Euclid's original action in the Ohio Supreme Court was an objection to the terms of its 1977 NPDES Permit, Euclid is not in actuality objecting to this permit. Indeed, Euclid did not object to the terms of its permit in 1976, when it was issued its first NPDES Permit, or in 1977, when it was issued its second NPDES Permit. Rather, Euclid objects to being sued to force it to finally come into compliance. Unfortunately, Euclid's twenty years of backsliding on promises to upgrade its sewage treatment plant have had a continuing detrimental impact upon the water quality of the near shore area of Lake Erie where its WWTP discharges supposedly treated effluent, as well as upon the Lake Erie beaches in the Euclid area, where untreated and partially treated human wastes, waste sludges,

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[8] The last stage of treatment in Euclid's WWTP is accomplished by forcing wastewater which has already gone through the first and second stages of Euclid's WWTP through large filtration devices that resemble, in operation, giant sieves. Ohio EPA's January, 1979, inspection found all of these filters to be broken down, and in its May 14, 1979, Findings and Orders Ohio EPA ordered Euclid to place them back in operation by September 14, 1979. In an inspection conducted on February 26, 1987, Ohio EPA found that none of these filters were operable.

toilet paper, and the like have regularly washed ashore from Euclid's WWTP bypass pipe during wet weather.

II. THE PROCEEDINGS BELOW

Proceedings in three separate tribunals, one administrative and two judicial, preceded the instant appeal. These proceedings are briefly summarized below in chronological order.

As has already been described, in 1976 and 1977, Euclid applied for and was issued by Ohio EPA an NPDES Permit authorizing the City to discharge wastewater into Lake Erie having a concentration of suspended solids and organic contaminants having a biochemical oxygen demand of 12 milligrams per liter for each pollutant. Although allowed by Ohio law, Euclid did not appeal the issuance of either of these permits to the Ohio Environmental Board of Review ("OEBR"), the tribunal vested under Ohio in with exclusive original jurisdiction to review permitting actions of Ohio EPA. See, Ohio Revised Code §3745.04.

In May of 1982, shortly before its 1977 NPDES Permit was set to expire, Euclid submitted an application[9] to Ohio EPA asking that its 1977 NPDES Permit be renewed.[10] Rather than deny the application, which is what Euclid's compliance history required the Agency to do under Ohio law, (see Ohio Revised Code Section 6111.03(J)), Ohio EPA decided to delay action to see if the City could bring its WWTP into compliance.

By the fall of 1983, it appeared that the City's efforts to achieve compliance would be either unsuccessful or

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[9] In April of 1982, Euclid wrote Ohio EPA a letter asking that Agency to relax the City's NPDES Permit limits when its permit was next renewed.

[10] Ohio Revised Code Section 119.07 allows an applicant for permit renewal to continue to operate under an expired permit while its renewal application is pending.

unreasonably delayed. For that reason in September of 1983, the United States filed an enforcement action under the Clean Water Act against Euclid in the United States District Court for the Northern District of Ohio, Eastern Division, (Case No. 83-3855) for civil penalties and injunctive relief as a consequence of the City's violations of its 1977 NPDES Permit. The State of Ohio was made a party defendant to this suit. In its answer to the complaint of the United States, the State of Ohio filed a cross-claim against Euclid for civil penalties and injunctive relief under the citizen suit provisions of the Clean Water Act, 33 U.S.C. §1365, and Ohio's Water Pollution Control Act, Ohio Revised Code Chapter 6111, as a consequence of Euclid's violations of its 1977 NPDES Permit.

From the filing of this enforcement action in 1983 until the Spring of 1987, discovery, pre-trial motions practice, and settlement negotiations proceeded for the most part concurrently. During settlement negotiations Euclid became aware that Ohio EPA only had on file an application for renewal of its 1977 NPDES Permit and in February of 1986, Euclid submitted a formal application to Ohio EPA for a modification of these limits.

Since by April of 1987 it appeared that the case would not be settled, on April 20, 1987, Ohio EPA denied Euclid's May, 1982, NPDES Permit renewal application by proposed action[11] and on June 16, 1987, denied Euclid's February, 1986, NPDES Permit modification application by proposed action.

Ohio law affords applicants for environmental permits two opportunities for a formal hearing. When Ohio EPA wishes to deny a permit application, it must afford the applicant an opportunity for an adjudicatory hearing before the Agency.

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[11] Under Ohio law, before Ohio EPA may finally deny a permit application it must give notice to the applicant of its proposed action, and afford the applicant an adjudicatory hearing if one is requested. See, *General Motors Corporation v. McAvoy*, 63 Ohio St. 2d 232, 407 N.E.2d 527 (1980).

Based upon this hearing, the Ohio EPA director renders a final decision on the application, and any person who was a party to the proceeding may file an appeal within thirty (30) days to the Ohio Environmental Board of Review ("OEBR"). In such an appeal the Board reviews the validity of Ohio EPA's action based upon the evidence submitted during the adjudicatory hearing. See, Ohio Revised Code Section 3745.04.

In contrast, when the Ohio EPA Director wishes to grant a permit application, Ohio law allows him to do so without affording a prior adjudicatory hearing. If the applicant, or anyone else, is or claims to be adversely affected by the Director's decision, he or she may file an appeal within thirty (30) days to the OEBR. In such an appeal the Board exercises original jurisidction, conducts an evidentiary hearing, and, based upon the evidence in the record, affirms or reverses the Director. See, Ohio Revised Code Section 3745.07.

Regardless of whether the Ohio Environmental Board of Review's original or appellate jurisdiction is invoked, under Ohio law the Board's jurisdiction to review in the first instance the validity of final actions of the Ohio EPA Director is exclusive. See, *State, ex rel. Tyler v. McMonagle,* 25 Ohio St.3d 13, 494 N.E.2d 1144 (1986); *State, ex rel. Maynard v. Whitfield,* 12 Ohio St.3d 49, 465 N.E. 2d 406 (1984); *Warren Molded Plastics, Inc. v. Williams,* 56 Ohio St.2d 352, 384 N.E. 2d 253 (1978); *State ex rel Williams v. Bozarth,* 55 Ohio St.2d 34, 377 N.E.2d 1006 (1978); *Cincinnati, ex rel. Crotty v. City of Cincinnati,* 50 Ohio St.2d 27, 361 N.E.2d 1340 (1977).

In accordance with the administrative review process outlined above, Euclid received notice of Ohio EPA's proposed denial of its May, 1982, NPDES Permit renewal application. However, in an attempt to short circuit this process, the City filed an original action in the Ohio Supreme Court against the Ohio EPA Director for two high prerogative writs, a writ of mandamus and a writ of prohibition. Only subsequently did the City file with Ohio EPA a formal request for an adjudicatory hearing pursuant to Ohio Revised Code Section 3745.07.

Generally speaking, in its complaint for mandamus and/or prohibition, Euclid alleged that the Ohio EPA Director's inclusion of 12/12 limits in Euclid's 1977 NPDES Permit, denial of Euclid's NPDES Permit renewal and modification applications, and pursuit of injunctive relief and civil penalties in the 1983 federal enforcement action violated State law, the federal Clean Water Act, and the Equal Protection Clause of the Fourteenth Amendment. Without specifying under which writ its various requests for relief were sought, in its complaint Euclid asked the Ohio Supreme Court to compel Ohio EPA to grant its NPDES Permit renewal application, to require Ohio EPA to include much more lenient effluent limitations in the renewed permit (and any future permits issued to the City), to rewrite "nunc pro tunc"[12] (as Euclid put it) the City's 1977 NPDES permit to relax the effluent lilmitations set forth in that permit, and to prohibit the State from pursuing its pending enforcement action in the Federal District Court.[13]

In response, the Ohio EPA Director filed a motion to dismiss which argued that, for various reasons, under Ohio law none of the relief sought by the City could be had from the Ohio Supreme Court. One of the reasons advanced was the fact that, under Ohio law, neither mandamus nor prohibition can be used to short circuit the exclusive administrative scheme for reviewing permitting decisions of the Ohio EPA Director set forth in Ohio Revised Code Section 3745.04 and 3745.07.

Another reason was that prohibition is only available under Ohio law to prevent the unauthorized use of judicial power and not: (1) to correct the allegedly unlawful permit terms

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[12] Under Ohio law, when a court or quasi-judicial agency issues an entry to correct *clerical* errors in an earlier entry, it does so "nunc pro tunc". See 62 Ohio Jur.3d Judgments, §§83-84.

[13] Of course, since the basis for the United States' action in the District Court was the City's violations of the effluent limitations of Euclid's 1977 NPDES permit, if the Ohio Supreme Court *ex post facto* relaxed those limitations, the United States' cause of action against Euclid would be reduced dramatically in scope or disappear entirely.

set forth in Euclid's 1977 NPDES permit; (2) to prevent the Ohio EPA Director from including allegedly unlawful terms or limitations in any future NPDES permit issued to the City; (3) as a substitute for appeal from the Director's decision to deny Euclid's NPDES permit renewal and modification applications; (4) to control the enforcement discretion of the State. Yet another reason was that under Ohio law, mandamus is only available to require a public officer such as the Director to carry out a ministerial function, one not involving the exercise of discretion, and *not:* (1) as a substitute for appeal from the denial of its 1982 and 1986 NPDES permit renewal and modification applications or the inclusion in 1977 of effluent limitations in Euclid's second NPDES permit the City now considers unlawfully stringent; (2) to control the content of future NPDES permits which the State might issue the City; (3) to compel Ohio EPA to change the substantive provisions of a permit it issued more than a decade ago.

Ultimately, the Ohio Supreme Court found these arguments to be well taken, and dismissed Euclid's complaint, without reaching the merits of Euclid's arguments that Ohio EPA's inclusion of 12/12 limits violated the Federal Clean Water Act and denied it the equal protection of the laws. It is from the Ohio Supreme Court's dismissal entry, which appears at A-1 in Euclid's Appendix, that Euclid attempts to appeal.

ARGUMENT

I. Where The Appellant Has Failed To Raise In The Court Below A Challenge To Any State Statute As Repugnant To Federal Law And The Decision Of The Court Below Has Not Decided The Validity Of Any State Statute No Appeal Under 28 U.S.C. §1257(2) Is Authorized.

In filing its jurisdictional statement the City of Euclid has attempted to invoke this Court's jurisdiction under 28 U.S.C. §1257(2). The discussion of the facts, both in the City of Euclid's Jurisdictional Statement, and in this response of

Appellee Shank, makes it clear that Euclid has improperly sought to rely on 28 U.S.C. §1257(2). Euclid's concerns, both as raised in the Ohio Supreme Court and as restated to this Court do not involve a challenge to any Ohio statute as repugnant to federal law. Not only did the City of Euclid fail to challenge any state statute below but, indeed, the only reference to any state statute, made in any of the pleadings below, was to a portion of Chapter 6111 of the Ohio Revised Code which expressly requires that Ohio's Director of Environmental Protection act in accordance with the requirements of 33 U.S.C. 1251 *et. seq.* in issuing NPDES permits under Ohio's NPDES permit program. See §6111.03 O.R.C. In short, both in the Ohio Supreme Court and in this Court Euclid is not seeking to challenge the validity of any Ohio statute. It is therefore, unquestionable that jurisdiction does not lie for an appeal to this Court under 28 U.S.C. §1257(2).

The case law discussing 28 U.S.C. §1257(2) is both voluminous and clear. In order for this Court to take jurisdiction of an appeal under this provision it is essential that the appellant must present a challenge to a specific state statute as being repugnant to the federal constitution, laws, or treaties. This Court has repeatedly held that an appeal is not authorized under 28 U.S.C.§1257(2) unless it is clear that there has been an explicit and timely insistence in the State courts that a state statute, as applied, is repugnant to the federal constitution, treaties, or laws. *Raley v. Ohio* 360 U.S. 423, 435, 79 S.Ct. 1257, 1264 (1959); *Ireland v. Woods* 246 U.S. 323, 38 S.Ct. 319 (1918); *Kulko v. Superior Court of California,* 436 U.S. 84, 98 S.Ct. 1690 (1978), *reh. den.* 438 U.S. 908, 98 S.Ct. 3127 (1978); *Addington v. Texas* 441 U.S. 418, 99 S.Ct. 1804 (1979).

The concept behind 28 U.S.C. §1257(2) is to provide for an appeal from a final judgment of the highest court of a state when the validity of a challenged state statute is sustained as not in conflict with federal law. *Southland v. Keating* 465 U.S. 1, 6, 104 S.Ct. 852, 856 (1984). For this reason this Court has routinely held that the record below must show that there was a claim or challenge raised to

a specific state statute as repugnant to federal law and this challenge or claim was denied. *Seaboard Airline Railway v. Duvall*, 225 U.S. 477, 481, 32 S.Ct. 790 (1912); *Mellon v. O'Neil* 275 U.S. 212, 214, 48 S.Ct. 62, 63 (1927); *DeBacker v. Brainard* 396 U.S. 28, 32, 90 S.Ct. 163, 165-6 (1969); *Wilson v. Cook*, 327 U.S. 474, 480, 66 S. Ct. 663, 666 (1946).

Thus, not only must a challenge to a state statute have clearly been raised below, but it must also have been passed on by the court below. Indeed, this Court has held that to invoke 28 U.S.C. §1257(2) it must appear on the face of the record that the "judicial mind of the court was exercised" upon the challenge and that it could not have rendered the judgment that it did without deciding the challenge. *Seaboard, supra* at 225 U.S. 281, 325 S.Ct. 792-793. In short, the challenge must have been expressly and necessarily decided by the state court. *Mellon v. O'Neil, supra*, and *Wilson v. Cook*, 327 U.S. 474, 480, 66 S.Ct. 663, 666 (1946).

Where the lower court could have based its decision on other grounds, an appeal does not lie under 28 U.S.C. §1257(2). *Cockroft v. Vose*, 81 U.S. 5 (1872). The Supreme Court has rigorously adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. Further, in order for this Court to undertake a review,the fact that the State court decision does not rest on adequate and independent state grounds must appear of record. *Herb v. Pitcairn*, 324 U.S. 117, 125-128, 65 S.Ct. 459, 463-464 (1945).

In the instant case where the Appellant failed to raise any challenge to a state statute before the Court below there can be no doubt that an appeal does not lie under 28 U.S.C. §1257(2). Not only did Appellant fail to raise any challenge to a state statute below Appellant in fact invoked a state statute as requiring the Ohio EPA Director to act consistent with federal law. Further, a review of the proceeding below makes it clear that there were adequate and independent state grounds upon which the Ohio Supreme Court based its decision granting the motion to dismiss.Therefore, this Court should dismiss this appeal.

II. Given The Presence Of Adequate And Independent Grounds Under Ohio Law Supporting The Ohio Supreme Court's Decision To Reject Euclid's Demand That It Issue Two High Prerogative Writs, And the Absence of Any Substantial Federal Question Which Would Mandate That The Supreme Court Exercise Its Plenary Discretion As Demanded By The City, This Court Should Decline To Exercise Its Discretionary Jurisdiction In This Case.

At the outset this Court should clearly understand just what it was that Euclid sought from the Ohio Supreme Court. What Euclid asked Ohio's highest court to do was to exercise its original and highly discretionary jurisdiction in mandamus and prohibition to relieve Euclid of the City's water pollution control obligations under a permit Euclid accepted without objection more than a decade ago. Had the Ohio Supreme Court acquiesced, it would have had to overrule or ignore five (5) of its own decisions rendered during the period 1977-1986 holding that persons wishing to contest decisions of the Ohio EPA Director *must* follow the exclusive administrative scheme for doing so established by the Ohio General Assembly in Chapter 3745. of the Ohio Revised Code.

The evident purpose of this extraordinary legal maneuver was to foreclose a water pollution enforcement action against Euclid filed by the United States and the State of Ohio in Cleveland's federal district court. Given Euclid's twenty years of stumbling and inadequate efforts to upgrade its sewage treatment system, the Ohio Supreme Court's brief entry finding the Director's motion to dismiss to be well taken is hardly surprising. Euclid's hands were literally, as well as figuratively, unclean. What is surprising is that Euclid would attempt to persuade this Court to compel Ohio's highest court to exercise against its will that Court's original jurisidiction and plenary discretion to grant Euclid what amounts to amnesty for its decades of environmentally mistreating the near shore areas of Lake Erie adjacent to the City's WWTP discharge pipe.

Even if Euclid's hands were "cleaner" regarding operations at its WWTP, review would still not be appropriate in this case because adequate independent grounds under Ohio law exist which support the Ohio Supreme Court's decision to dismiss Euclid's complaint in mandamus and prohibition, and, in any event, no substantial federal question exists in the case at bar which would require reversing the Court below.

The major rules governing discretionary review by this Court of the final judgments of state courts which involve issues of both state and federal law were summarized by Justice Burton in his opinion for the Court in *Durley v. Mayo*, 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 428 (1957), *reh. den.* 352 U.S. 859, 77 S.Ct. 22, 1 L.Ed 2d 69 (1958). In that case the State of Florida strenuously contested the assumption of certiorari jurisdiction by the U.S. Supreme Court on the ground that the decision appealed from, the denial of a petition for a writ of *habeas corpus*, may have rested upon one or both of two adequate state grounds. In sustaining Florida's jurisdictional objection, Justice Burton wrote:

> In the face of these expressions of the law of Florida, petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below. "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Stembridge v. State of Georgia*, 343 U.S. 541, 547, 72 S.Ct. 834, 387, 96 L.Ed. 1130.
>
> 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Honeyman v. Hanan*, 300 U.S. 14, 18, 57 S.Ct. 350,

> 352, 81 L.Ed. 476; *Lynch v. [People of] New York [ex rel. Pierson],* 293 U.S. 52, 55 S. Ct. 16, 79 L.Ed. 191. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. *Klinger v. [State of] Missouri,* 13 Wall. 257,263,20 L.Ed. 635; *[Walter A.] Wood Mowing & Reaping Machine Co. v. Skinner,* 139 U.S. 293, 297, 11 S. Ct. 528, 530, 35 L.Ed. 193; *Allen v. Arguimbau,* 198 U.S. 149, 154-155, 25 S. Ct. 622, 624, 49 L.Ed. 990; *Lynch v. [People of] New York [ex rel. Pierson], supra.*
>
> * * * But it is likewise well settled that if the independent [state] ground was not a substantial or sufficient one, 'it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.' *Klinger v. [State of] Missouri, supra, 13 Wall.* at page 263, 20 L.Ed. 635; *Johnson v. Risk,* 137 U.S. 300, 307, 11 S.Ct. 111, 113, 34 L.Ed. 683; *Lawrence v. State Tax Commission,* 286 U.S. 276,282-283, 52 S.Ct. 556, 558, 76 L.Ed. 1102." *Williams v. Kaiser,* 323 U.S. 471, 477-478, 65 S. Ct. 363, 367, 89 L.Ed. 398.

(Emphasis in original). 351 U.S. at 281-282, 76 S. Ct. at 809. See also, *International Long Shoreman's Assoc., AFL-CIO v. Davis,* ____ *U.S.* ____, 106 S.Ct. 1904, 90 L.Ed. 2d 389 (1986); *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), *reh. den.* 463 U.S.1237, 104 S.Ct. 33, 77 L.Ed. 2d 1453 (1983); *Street v. New York,* 394 U.S. 576, 89 S. Ct. 1354, 22 L.ed. 2d 572 (1969); *California Department of Mental Hygiene v. Kirchner,* 380 U.S. 194, 55 S. Ct. 871, 13 L.Ed. 2d 753 (1965); *Bell v. Maryland,* 378 U.S. 226, 84 S. Ct. 1814, 12 L.Ed. 2d 822 (1964).

Of course, even when a state court decides a case solely upon federal law grounds, this Court will not ordinarily accept the case for discretionary review if the federal question was

decided correctly, especially where the matter was not a close one. As Justice Stevens once observed, "the Court seldom takes a case to reaffirm settled law." *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Dissent). Thus the Court should dismiss this appeal.

With respect to the State law grounds supporting the decision of the Court below to dismiss Euclid's complaint for mandamus and prohibition, in his motion to dismiss the Ohio EPA Director made three major arguments in support of dismissal, all of which were founded upon principles of Ohio law in no way related to or dependent upon federal law. First, the Director argued that under the Ohio Supreme Court's own rulings in *McMonagle, supra, Whitfield, supra, Warren Molded Plastics, supra, Bozarth, supra,* and *City of Cincinnati, supra,* Euclid's complaint for mandamus and prohibition failed to state a claim for which relief could be granted, for in those decisions the Court had unequivocally established that under Ohio law the *exclusive* avenue for relief from decisions of the Ohio EPA Director was the administrative review scheme established by the Ohio legislature in Ohio Revised Code Sections 3745.04 and 3745.07. Since all of the claims set forth in Euclid's complaint in the Court below relate to permitting decisions of Ohio EPA (e.g., the limitations which should have been included in Euclid's 1977 NPDES Permit; what NPDES Permit limitations should be enforced against Euclid in the 1983 federal enforcement action; whether Euclid's 1982 NPDES Permit renewal and 1986 NPDES Permit modification applications should be granted, and if so, upon what terms; and what limitations should be included in Euclid's future NPDES Permits), the Ohio Supreme Court could not, consistent with its own decisions of recent vintage, entertain Euclid's attempt to side-step this exclusive statutory review scheme.

Second, the Ohio EPA Director argued that, pursuant to established principles of Ohio law, Euclid's request for a writ of prohibition would have to be denied because Euclid had failed to allege that the Ohio EPA Director had, or was about to, exercise judicial or quasi-judicial power not vested

in his office by the Ohio legislature. Under Ohio law, prohibition is only available to prevent an officer from exercising judicial or quasi-judicial power unauthorized by law, *Manrow v. Court of Common Pleas,* 20 Ohio St. 3d 37, 485 N.E. 2d 713 (1985); *State ex rel. Stanner v. Dehoff,* 18 Ohio St.3d 163, 480 N.E. 2d 49 (1985); *Bobb v. Marchant,* 14 Ohio St.3d 1, 469 N.E.2d 847 (1984); *State ex rel. Cleveland Regional Transit Authority v. Guzzo,* 6 Ohio St. 3d 270, 452 N.E. 2d 1314 (1983), and not as a substitute for appeal, to preempt anticipated error at the trial or appellate level, or to correct or review a completed course of conduct alleged to be erroneous or unlawful. *Cleveland Regional Transit Authority, supra, Luchene v. Wagner,* 12 Ohio St. 3d 37, 465 N.E. 2d 395 (1984); *State ex rel Lesher v. Kainrad,* 65 Ohio St. 2d 60, 417 N.E.2d 1382 (1981), *cert. den.* 454 U.S. 854 (1982); *State ex rel. Dayton v. Kerns,* 49 Ohio St. 2d 295, 361 N.E. 2d 247 (1977); *State ex rel Woodbury v. Spitler,* 34 Ohio St.2d 134, 296 N.E. 2d 526 (1973), *cert. den.* 415 U.S. 913 (1973); *State ex rel Flannery v. Sidwell,* 24 Ohio St.2d 74, 763 N.E. 568 (1970).

All that Euclid's complaint against the Ohio EPA Director in the Court below asserted was that the Director acted unlawfully in issuing the City's 1977 NPDES Permit and denying Euclid's NPDES Permit renewal and modification applications, and that the Director should not be permitted to enforce against Euclid the unlawful 1977 permit in the federal district court. Since it is clear law in Ohio that the initiation and pursuit of enforcement litigation by a public officer involves the exercise of prosecutorial discretion rather than judicial or quasi-judicial power, State ex rel. *Gray v. Leis,* 62 Ohio St. 2d 102 (1980); *State ex rel. Parker v. Common Pleas Court,* 61 Ohio St.2d 351, 402 N.E.2d 508 (1980), and since even Euclid conceeds that the Ohio EPA Director has the legal authority under Ohio Revised Code Section 6111.03 to act upon NPDES Permit applications, the Director reasoned that Euclid was attempting to use prohibition as a substitute for appeal and to correct past actions of the Director it deems unlawful. As the preceding discussion makes plain, prohibition is not available under Ohio law under these circumstances.

Third, the Ohio EPA Director argued that, as a matter of Ohio law, mandamus was not available to control the discretion of the Ohio EPA Director with respect to the issuance, modification, renewal, or enforcement of NPDES Permits, or the selection of any effluent limitations the Director might chose to include in any NPDES Permit, renewal, or modification, and especially not as a substitute for appeal from legal errors the Director allegedly committed in connection with the issuance, renewal or modification of such a permit. Under Ohio law mandamus is a high prerogative writ used to compel an administrative officer to perform a ministerial, non-discretionary duty, and the case law is legion in Ohio that mandamus will not lie to substitute the discretion of a judicial tribunal for that of an adminsitrative officer or inferior tribunal, see, e.g., *State ex rel. Phillips v. Industrial Commission,* 5 Ohio St.3d 202, 449 N.E.2d 1307 (1903); *State ex rel. Board of Education v. State Department of Education,* 67 Ohio St.2d 126, 423 N.E.2d 174 (1981); *State ex rel. Benton's Village Sanitation Service, Inc. v. Usher,* 34 Ohio St.2d 59, 295 N.E. 2d 657 (1973), or as a substitute for appeal, see, e.g., *State ex rel. Ohio Elec Ry. Co. v. Public Utilities Commission,* 101 Ohio St. 313, 128 N.E. 83 (1920); *State ex rel Webb v. Board of Education,* 10 Ohio St. 3d 27 (1984); *Luchene v. Wagner, supra; Spitler, supra,* not even when the petitioner has no other remedy available because he has allowed an appeal period to run, *State ex rel Lesher v. Kainrad, supra.* Ohio case law is filled with examples of where Ohio's highest court has refused to compel by mandamus the isuance of a permit, see, e.g., *State ex rel Fred Stecker Lincoln-Mercury Inc. v. Ohio Motor Vehicles Board,* 18 Ohio St. 3d 391, 481 N.E. 2d 635 (1985); *State ex rel Association of Insurance Agents v. Ohio Department of Insurance,* 29 Ohio St. 2d 188, 281 N.E. 2d 9 (1972); *State ex rel Hacharedi v. Baxter,* 148 Ohio St. 221, 74 N.E. 2d 242 (1947); *State ex rel Bauer v. Hanefeld,* 134 Ohio St. 540, 18 N.E. 2d 404 (1939); *State ex rel. Collett v. Truax,* 117 Ohio St. 78, 157 N.E. 792 (1927); *State ex rel. Hygea v. Coleman,* 64 Ohio St. 377, 60 N.E. 568 (1901), including an environmental permit, *State ex rel Benton's Village Sanitation Service, Inc., supra.* Clearly, as a matter of Ohio law

mandamus is not available under the circumstances of this case.

The only reply Euclid made to all of this in the Court below was that by including 12/12 limits in Euclid's 1977 NPDES Permit, seeking to enforce those limits in the federal district court, and denying Euclid's NPDES Permit renewal and modification applications because of the City's failure to comply with these limits, the Ohio EPA Director violated Section 301 of the Clean Water Act, 33 U.S.C. §1311, (which, according to the City, requires the State to grant Euclid much more lenient effluent limitations), as well as the guarantees of the equal protection of the laws set forth in the Fourteenth Amendment to the U.S. Constitution.[14]

Although these arguments are clearly mistaken, see discussion *supra*, it is important to note that, even if Euclid was correct that the Director's conduct violated federal law, the Ohio Supreme Court still acted correctly in dismissing Euclid's original action in mandamus and prohibition. Under Ohio law unlawful conduct alone is insufficient to support the issuance of either writ. Moreover, limitations upon the Ohio Supreme Court's original jurisdiction imposed by Article IV, Section 2 of the Ohio Constitution[15] did not allow the Court to provide Euclid with any other relief. See, *State, ex rel Smith v. Industrial Commission*, 139 Ohio St. 303, 39 N.E.2d 838 (1939). Since the U.S. Supreme Court has no authority to review state determinations of issues of state law unrelated to and unaffected by federal law, any decision it might make with respect to the federal issues in this case would not effect the judgment of the Ohio Supreme Court. Therefore, even if it does agree with Euclid's contentions with respect

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[14] Euclid also argued that the Director's conduct violated the Ohio constitution, but those arguments are irrelevant to this discussion.

[15] The Ohio Supreme Court's original jurisdiciton under Article IV Section 2 of the Ohio Constitution is limited to the extraordinary writs of mandamus, prohibition, quo warranto, habeas corpus, and procedendo, none of which could provide Euclid the relief it sought from the Ohio Supreme Court.

to the unlawfulness of the Director's conduct under federal law, this Court should still not accept jurisdiction over this case because any opinion it renders with respect to the federal law issues will be an advisory opinion. *International Long Shoreman's Association, AFL-CIO v. Davis, supra.*

In any event, Euclid is clearly wrong with respect to whether the Director's conduct violated federal law. It is settled law that, as creations of the States, cities have no equal protection rights against the states which created them, *United Building and Construction Trades Council v. Mayor and Council of City of Camden,* 465 U.S. 208, 104 S. Ct. 1020, 79 L.Ed. 22 249 (1984); *United States v. McGee,* 714 F.2d 607 (6th Cir., 1983); *City of Newark v. State of New Jersey,* 262, U.S. 192, 196, 43 S.Ct. 539, 540, 67 L.Ed. 943 (1923). *Risty v. Chicago, R.I. & Pac. Ry. Co.,* 270 U.S. 378, 390, 46 S.Ct. 236, 241, 70 L.Ed. 641 (1926), *City of Trenton v. State of New Jersey,* 262 U.S. 378, 390, 46 S.Ct. 236, 241, 70 L.Ed. 641 (1978); *Williams v. Mayor and Council of Baltimore,* 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933); *City of Moore v. Atchison, Topeka & Santa Fe Ry Co.,* 699 F.2d 507 (10th Cir., 1983); *Commissioner of Highways v. United States,* 653 F2d 292 (7th Cir., 1981); *Allegheny County Sanitary Authority v. U.S. EPA,* 557 F. Supp. 49 (W.D. Pa. 1983), *aff'd* 732 F.2d 1167 (3d Cir., 1983); *Jefferson Township v. City of West Carrolton,* 517 F.Supp 417 (N.D. Oh., 1981), *aff'd* 732 F.2d 1167 (3d Cir., 1983). Further, for the reasons set forth below, it is not the case that including 12/12 limits in Euclid's 1977 NPDES permit violated the Clean Water Act's provisions regarding technology based effluent limitations as Euclid contends.

According to Euclid, imposition of the 12/12 limit which is the basis of this entire controversy violates Section 301(b) of the Clean Water Act, 33 U.S.C.§ 1311(b), because, according to Euclid, that section only requires Euclid to comply with federal "secondary treatment" standards, which, for the pollutants involved, are 30/30 rather than 12/12. 40 C.F.R. 133. This is not the law.

Consistent with its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C.§ 1251(b), when Congress enacted Section 301(b) of the Act in 1972, it specifically recognized in 33 U.S.C. §1311 (b)(1)(C) that municipalities would be expected to comply not only with "secondary treatment" standards set by the federal government, but also any more stringent standard a state might wish to impose either pursuant to Section 303 of the Act, 33 U.S.C. §1313 (under which the states are encouraged to adopt water quality standards to protect and enhance the quality of receiving waters), or pursuant to 33 U.S.C. §1370, (under which states are authorized to adopt and enforce more stringent standards and effluent limitations). It is therefore obvious from the plain language of 33 U.S.C. §1311(b)(1)(C) and 33 U.S.C. §1370 was not violated by Ohio EPA's inclusion of 12/12 limits in Euclid's 1977 NPDES permit, Euclid's belief to the contrary notwithstanding.

In sum, the judgment of the Ohio Supreme Court Euclid seeks to have this Court review is supported by three adequate and independent grounds under Ohio law: (1) the exclusive forum under Ohio law for reviewing the actions of the Ohio EPA Director which Euclid complains of is the Ohio Environmental Board of Review; (2) prohibition was not available under Ohio law in the absence of an allegation that the Ohio EPA Director had, or was about to, exercise judicial or quasi-judicial power not vested in his office by the Ohio legislature; and (3) mandamus was not available under Ohio law to control the discretion of the Ohio EPA Director in acting upon Euclid's various NPDES permit applications, or as a substitute for appeal. On the basis of these three grounds under Ohio law, this Court would have to sustain the judgment of the Court below regardless of its opinion with respect to Euclid's Equal Protection and Clean Water Act arguments. Finally, the case at bar poses no substantial federal question for the Court's review either under the Equal Protection Clause or the Clean Water Act. For the foregoing reasons this Court should either summarily affirm the lower court or not accept this case for review.

CONCLUSION

For the reasons set forth above, this Court should grant Appellee's Motion and either dismiss the appeal or affirm the decision below.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL OF OHIO

MARGARET A. MALONE
Assistant Attorney General
Environmental Enforcement Section
30 East Broad St., 17th Floor
Columbus, Ohio 43266-0410
(614) 466-2766

CERTIFICATE OF SERVICE

Three copies of the foregoing Motion to Dismiss or Affirm were forwarded by regular U.S. Mail, postage prepaid to Henry B. Fisher, Walter, Haverfield, Buescher & Chockley, 1215 Terminal Tower, Cleveland, Ohio 44113, Counsel of Record for Appellant on this 14th day of April, 1988.

MARGARET A. MALONE
Assistant Attorney General

APPENDIX 1

33 U.S.C. §1257(2) State courts; appeal.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

33 U.S.C. §1251(b)

Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act [33 USCS §§1342, 1344]. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

33 U.S.C. §1311.(b)(1) Effluent limitations

Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved-

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control

technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 USCS§1314(b)], or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph
(B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act [33 USCS §1317]; and (B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act [33 USCS § 1283] prior to June 30, 1984 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act [33 USCS § 1314(d)(1)]; or,
(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 USCS § 1370]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

33 U.S.C. §1370. State authority

Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act , such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2)

be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

§6111.03(J) Ohio Revised Code, Powers of director of environmental protection.

The director of environmental protection may:

Issue, revoke, modify, or deny permits for the discharge of sewage, industrial waste, or other wastes into the waters of the state, and for the installation or modification of disposal systems or any parts thereof in compliance with all requirements of the "Federal Water Pollution Control Act" and mandatory regulations adopted thereunder, and set terms and conditions of permits, including schedules of compliance, where necessary. The terms and conditions shall be designed to achieve and maintain full compliance with the national effluent limitations, national standards of performance for new sources, and national toxic and pretreatment effluent standards set under such act, and any other mandatory requirements of such act that are imposed by regulation of the administrator of the United States environmental protection agency. An application for a permit or renewal thereof shall be denied if:

(1) The secretary of the army determines in writing that anchorage or navigation would be substantially impaired thereby;

(2) The director determines that the proposed discharge or source would conflict with an area wide waste treatment management plan adopted in accordance with section 208 of the "Federal Water Pollution Act";

(3) The administrator of the United States environmental protection agency objects in writing to the issuance or renewal of the permit in accordance with section 402(d) of the "Federal Water Pollution Control Act; or

(4) The application is for the discharge of any radiological, chemical, or biological warfare agent, or high-level radioactive waste into the waters of the United States.

To achieve and maintain applicable standards of quality for the waters of the state adopted pursuant to section

6111.041 [6111.041] of the Revised Code, the director shall impose, where necessary and appropriate, as conditions of each permit, water quality related effluent limitations in accordance with sections 301, 302, 206, and 307 of the "Federal Water Pollution Control Act" and, to the extent consistent with such act, shall give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of removing the pollution properties from such wastes and to evidence relating to conditions calculated to result from such action, and their relation to benefits to the people of the state and to accomplishment of the purposes of Chapter 6111. of the Revised Code.

Where a discharge having a thermal component from a source that is constructed or modified on or after October 18, 1972, meets national or state effluent limitations or more stringent permit conditions designed to achieve and maintain compliance with applicable standards of quality for the waters of the state, which limitations or conditions will assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in or on the body of water into which the discharge is made, taking into account the interaction of such thermal component with sewage, industrial waste, or other wastes, the director shall not impose any more stringent limitation on the thermal component of such discharge, as a condition of a permit or renewal thereof for such discharge, during a ten-year period of competition of construction or modification of the source, or during the period of depreciation or amortization of the source for the purpose of section 167 or 169 of the Internal Revenue Code of 1954, whichever period ends first.

The director shall specify in permits for the discharge of sewage, industrial waste, and other waste, the net volume, net weight, duration, frequency, and, where necessary, concentration of such sewage, industrial waste, and other wastes which may be discharged into the waters of the state. The director shall specify in such permits that the permit is conditioned upon payment of applicable fees as required by section 3745.11 of the Revised Code and upon the right

of his authorized representatives to enter upon the premises of the person to whom the permit has been issued for the purpose of determining compliance with Chapter 6111. of the Revised Code, rules adopted thereunder, or the terms and conditions of a permit, order, or other determination. The director shall issue or deny an application for a permit for a new discharge, for the installation or modification of a disposal system, or for renewal of a permit, within one hundred eighty days of the date on which he receives a complete application with all plans, specifications , construction schedules, and other pertinent information required by the director. The director may condition permits upon the installation of discharge or water quality monitoring equipment or devices and the filing of such periodic reports on the amounts and contents of discharges and the quality of receiving waters as the director prescribes. the director shall condition each permit for a government-owned disposal system, or any other publicly owned "treatment works " as defined in the "Federal Water Pollution Control Act" upon the reporting of new introductions of industrial waste or other wastes and substantial changes in volume or character thereof being introduced into such systems or works from "industrial users" as defined in section 502 of such act, as necessary to comply with 402(b)(8) of such act; upon the identification of the character and volume of pollutants subject to pretreatment standards being introduced into such system or works; and upon the existence of a program to ensure compliance with pretreatment standards by "industrial users" of the system or works. In requiring monitoring devices and reports, the director, to the extent consistent with the "Federal Water Pollution Control Act", shall give consideration to technical feasibility and economic reasonableness, and allow reasonable time for compliance. A permit may be issued for a period not to exceed five years, and may be renewed upon application for renewal, and upon a finding by the director that the permit holder is making satisfactory progress toward the achievement of all applicable standards and has complied with the terms and conditions of the existing permit. A permit may be modified, suspended, or revoked for cause including, but not limited to; violation of any condition of the permit; obtaining a permit

by misrepresentation, or failure to disclose fully all relevant facts; or changes in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. No application shall be denied or permit revoked or modified without a written order stating the findings upon which the denial, revocation, or modification is based. A copy of the order shall be sent to the applicant or permit holder by certified mail.

3745.04 Ohio Revised Code, Creation of environmental board of review; membership; organization; employees and consultants; budget.

As used in this section, "any person" means any individual, any partnership, corporation, association, or other legal entity, or any political subdivision, or other legal entity, or any political subdivision, instrumentality, or agency of a state, whether or not the individual or legal entity is an applicant for or holder of a license, permit, or variance from the environmental protection agency, and includes any department, agency, or instrumentality of the federal government that is an applicant for or holder of a license, permit, or variance from the environmental protection agency.

As used in this section, "action" or "act" includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance or certificate, or the approval or disapproval of plans and specifications pursuant to law and rules adopted thereunder.

Any person who was a party to proceedings before the director may participate in an appeal to the environmental board of review for an order vacating or modifying the action of the director of environmental protection or local board of health, or ordering the director or board of health to perform an act. The environmental board of review has exclusive original jurisdiction over any matter which may, under this section, be brought before it.

The person so appealing to the board shall be known as appellant, and the director and any party to a proceedings substantially supporting the finding from which the appeal is taken shall be known as appellee, except that when an appeal involves a license to operate a disposal site or facility, the locate board of health or the director of environmental protection, and any party to a proceeding substantially supporting the finding from which the appeal is taken, shall, as appropriate, be known as the appellee. Appellant and appellees shall be deemed to be parties to the appeal.

The appeal shall be in writing and shall set forth the action complained of and the grounds upon which the appeal is based.

The appeal shall be filed with the board within thirty days after notice of the action. Notice of the filing of the appeal shall be filed with the appellee within three days after the appeal is filed with the board.

Within seven days after receipt of the notice of appeal the director or local board of health shall prepare and certify to the board a record of the proceedings out of which the appeal arises, including all documents and correspondence, and a transcript of all testimony.

Upon the filing of the appeal, the board shall fix the time and place at which the hearing on the appeal will be held. The board shall give appellant and the appellee at least ten days' written notice thereof by certified mail. The board shall hold the hearing within thirty days after the notice of appeal is filed. The board may postpone or continue any hearing upon its own motion or upon application of appellant or of the appellee.

The filing of an appeal does not automatically suspend or stay execution of the action appealed from. Upon application by the appellant the board may suspend or stay such execution pending immediate determination of the appeal without interruption by continuances, other than for unavoidable circumstances.

§3745.07 Ohio Revised Code, Mailing list; objections; notices, and adjudication hearings.

Before issuing, denying, modifying, revoking, or renewing any permit, license, or variance pursuant to Chapter 3704., 3734., or 6111. of the Revised Code, the director of environmental protection may issue a proposed action to the applicant that indicates the director's intent with regard to the issuance, denial, modification, revocation, or renewal of the permit, license, or variance. The director shall maintain a current mailing list of persons who, annually, subscribe for notification of all proposed actions, issuances, denials, modification, revocations and renewals of permits, licenses, and variances, verified complaints received, and all hearings and public meetings to be conducted pursuant to Chapters 3704., 3734., and 6111. of the Revised Code . The director shall mail notice to each subscriber of a proposed action or an issuance, denial, modification, revocation , or renewal of a permit, license, or variance within one week after issuance thereof, of a verified complaint within one week after receipt thereof, and of a hearing or public meeting at least two weeks before the hearing or public meeting. Failure to mail notice to any person subscribing to the mailing list shall not invalidate any proceeding or action of the director.

If the director receives a written objection to a proposed action, within thirty days of the date of issuance of the proposed action, from an officer of an agency of the state or of a political subdivision, acting in his representative capacity, or any person who would be aggrieved or adversely affected by the issuance or renewal of a permit, license, or variance, he shall conduct an adjudication hearing on the proposed action in accordance with sections 119.09 and 119.10 of the Revised Code, at which hearing such persons who submit objections, shall be parties. The director shall give notice of the hearing to all persons who submit objections, by certified mail at least thirty days before the hearing. Notwithstanding section 119.07 of the Revised Code, the director may schedule the adjudication hearing at any reasonable time not later than sixty days after receipt of the request for an adjudication hearing or receipt of an objection

to proposed action.

The director shall cause notice of each proposed action, each issuance, denial, modification, revocation, or renewal of a permit, license, or variance for which no proposed action was issued, each verified compliant received, and of each hearing or public meeting, to be published in a newspaper of general circulation in the country where the permit, license, or variance is sought or violation is alleged, within fifteen days after the date of the proposed action, the issuance, denial modification revocation , or renewal of a permit, license, or variance or of the receipt of the verified compliant, and at least thirty days prior to a hearing or public meeting.

The director shall collect from; each subscriber an annual subscription fee of seventy dollars to cover the expenses of notification by mail and by publication. All fees collected under this section shall be deposited in the general revenue fund.

If the director issues, denies, modifies, revoke, or renews a permit, license, or variance without issuing a proposed action, an officer of an agency of the state or of a political subdivision, acting in a representative capacity or any person who would be aggrieved or adversely affected thereby, may appeal to the environmental board of review within thirty days of the issuance, denial, modification, revocation, or renewal.

APPENDIX 2

EXHIBIT A

STATE OF OHIO)
) AFFIDAVIT
COUNTY OF FRANKLIN)

John Sadzewicz, being duly sworn and cautioned, hereby deposes and says as follows:

(1) That at all times pertinent to this matter he has been the manager of the Public Wastewater Section ("PWS") of Ohio EPA's Division of Wastewater Pollution Control.

(2) Further, that he has a B.S. in Civil Engineering (1963), is a registered Professional Engineer in the State of Ohio (1969) and has extensive experience (since 1963) in the area of water pollution design, engineering, and control, both in the public sector and the private sector.

(3) Further, that his duties as manager of PWS include overseeing the monitoring of municipal compliance with Ohio's water pollution control laws and regulations, enforcing these laws and regulations against municipal violators, issuing and monitoring NPDES permits, and maintaining, as ultimate custodian, Ohio EPA's working files on all municipal dischargers, including the City of Euclid.

(4) Further, that correspondence and other documents in Ohio EPA's wastewater files concerning the City of Euclid establish the following:

(a) On June 14, 1966, Euclid, in response to a request from the Ohio Department of Health, wrote a letter to the State declaring its intent to con[s]truct certain additions to its sewage treatment plan on or before September 30, 1969. In response, on November 10, 1966, the Ohio Water Pollution Control Board issued a permit to Euclid authorizing the City to discharge treated wastewater from its sewage treatment plan into Lake Erie, which permit, *inter alia,* required Euclid

to complete its planned improvements to its sewage treatment plant on or before September 30, 1969.

(b) Euclid never complied with the schedule for sewage treatment plant improvements set forth in its 1966 permit mainly because of public opposition to the proposed improvements (construction of which would have required expansion of Euclid's sewage treatment plant into a small city park as well as areas containing occupied residences). Instead, Euclid with the acquiescence of the Ohio Water Pollution Control Board, came up with a new (and advanced) design for sewage treatment plan improvements which did not require additional space, and proposed that the City complete detailed planning by June 30, 1972, and construction on or before May 25, 1974.

(c) Notwithstanding the City's commitment to complete planning in 1972 and construction in 1974, detailed plans for improvements to Euclid's sewage treatment plant were not completed until November 13, 1973, and construction was not even commenced until 1975, after Euclid received a grant of approximately $11 million from the United States and a loan of approximately $6 million from the State, at an interest rate substantially below market, to fund the construction work.

(d) Notwithstanding completion of these improvements and a later set of improvements, since 1978 Euclid has routinely reported and continues to report to Ohio EPA on a regular basis that it has discharged wastewater to Lake Erie with concentrations of solid and organics far in excess not only of the 20 parts per million limitation it seeks from Ohio EPA under the terms of its application for a modification of the limitations set forth in its 1977 NPDES permit governing such discharges, but also of the 30 parts per million limitation it requested in a letter to Ohio EPA dated April 1982.

(e) The limits Euclid seeks to challenge in this proceeding first appeared in a draft NPDES permit issued to Euclid in 1974, became final in 1976, and were reincorporated in Euclid's NPDES permit in 1977. At no time

in 1974, 1976, or 1977 did Euclid request a hearing before Ohio EPA on these limits, appeal these limits to the Ohio Environmental Board of Review or even protest to Ohio EPA concerning the inclusion of the limits in its permit.

(f) Euclid's 1977 NPDES permit was set to expire on its own terms on June 30, 1982. In April of 1982, Euclid wrote a letter to a low level Ohio EPA staffer generally complaining of the stringency of its NPDES permit limits and asking Ohio EPA to consider relaxing those limits, which Ohio EPA took this letter to be a request that, when two months later, Ohio EPA next renewed Euclid's 1977 permit, it relax the 12/12 solids/organics limits. In May of 1982, Euclid submitted to Ohio EPA an application for renewal of its 1977 NPDES permit which Ohio EPA denied by proposed action on April 20, 1987. In February of 1986 Euclid submitted to Ohio EPA an application for modification of Euclid's 1977 NPDES permit, which Ohio EPA denied by proposed action on June 16, 1987.

(g) In the months immediately preceding and following Euclid's submittal of its permit renewal ap[p]lication to Ohio EPA in May of 1982, Euclid was reporting to Ohio EPA that its sewage treatment plant was incapable of reducing the concentration of pollutants in the wastewater the plant discharged into Lake Erie in any consistent fashion. Ohio EPA did not act upon Euclid's renewal application because Ohio EPA could not on the basis of Euclid's reports to Ohio EPA ascertain what limits the agency might include in such permit that Euclid would have any hope of consistently meeting. Because O.R.C. §6111.03(J) requires Ohio EPA to deny renewal applications where the applicant is in violation of the permit to [be] renewed had Ohio EPA acted in the summer of 1982, it would have been forced to deny Euclid's renewal application.

(h) Later in 1982 Euclid, aware that it had serious problems with its sewage treatment plant, retained a Cleveland engineering firm to develop a plan to resolve Euclid's sewage treatment problems, which plan was completed in November of 1982. According to Euclid, as

of February 9, 1987, construction of these improvements was not yet 100% complete.

Further Affiant Sayeth Naught.

/S/ _____
JOHN SADZEWICZ

Sworn to and subscribed to before me, a notary public, this 17th day of June, 1987.

/S/ _____
KIMBERLY K. BELL
NOTARY PUBLIC